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JEANETTE M. C. LEE

BY: Ivy Rios

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

Cause no. V1300CR201080049

Div. PTB

STATE'S RESPONSE TO
DEFENDANT'S MOTION IN LIMINE No. 8
TO EXCLUDE THE TESTIMONY OF
STEVEN PACE

The State of Arizona, by and through undersigned counsel, hereby requests that the Court deny Defendant's motion *in limine* to exclude the testimony of Steven Pace. The motion should be denied for the reasons set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant's eighth motion *in limine* incorrectly argues that Steven Pace will be called to testify about the best practices of a corporate entity. Rather, Mr. Pace will be called to testify about the practices that a reasonable person in defendant's situation should have employed in connection with operating the sweat lodge and the spiritual warrior events leading up to the sweat lodge.

The State must prove defendant acted recklessly. Recklessly is defined as "with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the

1 circumstance exists. The risk must be of such nature and degree that disregard of such risk
2 constitutes a gross deviation from the **standard of conduct that a reasonable person would**
3 **observe in the situation.** A.R.S. §13-105(10)(c) (emphasis added).

4 In determining what constitutes a reasonable person, the court should look to the
5 particular circumstances surrounding the defendant. *See In re William G.*, 192 Ariz. 208, 963 P.2d
6 287 (App. 1997) (Holding that in a prosecution of a juvenile for reckless criminal damage, the
7 reckless person standard must be measured by a juvenile of similar age and experience as the
8 defendant); *and see State v. Miles*, 211 Ariz. 475, 482, 123 P.3d 669, 676 (App. 2005) (Holding
9 reasonable person standard looks to whether the defendant's actions "constituted a gross
10 deviation from conduct **a reasonable person would observe in a similar situation**") (emphasis
11 supplied). In this case, Mr. Pace will testify about the standards a reasonable person in
12 defendant's circumstances (e.g. the leader of an adventure program) should have complied with.
13
14

15 It is appropriate to utilize an expert to testify about the standard of care a reasonable
16 person should comply with. *See State v. Far West Water & Sewer Inc.*, 224 Ariz. 173, 193, 228
17 P.3d 909, 929 (App. 2010) (Holding that in prosecution for negligent homicide, the State's use of
18 expert testimony on industry standards helped the State to meet its burden of showing a gross
19 deviation from the requisite standard of care).
20

21 Rule 702, Ariz.R.Evid., provides that "[i]f scientific, technical, **or other specialized**
22 **knowledge** will assist the trier of fact to understand the evidence or to determine a fact in issue, a
23 witness qualified as an expert by knowledge, skill, experience, training, or education, may testify
24 thereto in the form of an opinion or otherwise." (emphasis supplied). Here, Mr. Pace has
25 specialized knowledge in the area of determining the risks associated with conducting an
26 adventure program, and in determining steps that should be taken to minimize or avoid the risks.

1 Because the knowledge of how to safely run an adventure program is knowledge that few, if any
2 jurors will possess, it is clearly appropriate fodder for an expert.

3 Defendant next argues that Mr. Pace's testimony should be excluded under Rule 403,
4 Ariz.R.Evid. Defendant bases this argument on its earlier, misguided argument that Mr. Pace's
5 testimony somehow only pertains to a corporation's liability, and would therefore confuse a jury.
6 As noted above, Mr. Pace will testify about the standard of care for a person running an adventure
7 program, precisely the situation that will be presented to the jury in this case. There is no danger
8 of confusion of the issues apart from what the defense may attempt to create.

9 Finally, defendant argues that Mr. Pace's testimony somehow is also limited to concepts
10 of civil negligence, and would therefore confuse a jury. Clearly, the State must prove
11 recklessness, not civil negligence. Defendant's motion fails to offer any authority that the use of
12 an expert is somehow only limited to civil negligence cases. Indeed, the *Far West Water &*
13 *Sewer Inc.* case discussed above stands for the proposition that the State may use an expert to
14 establish the requisite standard of care in a **criminal** case. Ariz. 173, 193, 228 P.3d 909, 929
15 (App. 2010). The criminal statutes defining criminal negligence and criminal recklessness are
16 virtually identical in their language dealing with the standard of care that a defendant must
17 deviate from. If an expert can be used in a criminal negligence case to establish the requisite
18 standard of care, clearly an expert may also be used in a criminal recklessness case to establish
19 the requisite standard of care.

20 . . .

21 . . .

Office of the Yavapai County Attorney

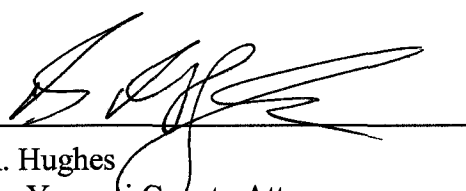
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Accordingly, for the foregoing reasons, the State respectfully requests the court deny defendant's eight motion *in limine* for the reason that Mr. Pace's testimony is appropriate to assist the jury in determining what the standard of care to be employed by an adventure program leader in defendant's circumstances.

Respectfully submitted this 8th day of February, 2011.

By 
Bill R. Hughes
Deputy Yavapai County Attorney

COPIES of the foregoing emailed this 8th day of February, 2011:

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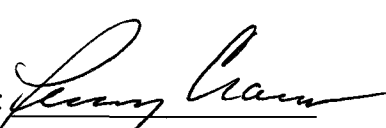
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